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8 UNITED STATES DISTRICT COURT  
9 NORTHERN DISTRICT OF CALIFORNIA  
10 SAN FRANCISCO DIVISION

11 UNITED STATES OF AMERICA,  
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13 Plaintiff,  
14 v.  
15 CARLOS E. KEPKE,  
16 Defendant.  
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Case No. 3:21-CR-00155-JD

**CARLOS KEPKE'S NOTICE OF  
MOTION AND MOTION TO  
EXCLUDE, OR IN THE  
ALTERNATIVE, TO LIMIT CERTAIN  
OPINIONS AND TESTIMONY OF  
AGENT JAMES OERTEL**

Date: August 29, 2022  
Time: 10:30 a.m.  
Courtroom: 11  
Judge: Hon. James Donato

**NOTICE OF MOTION**

Please take notice that on August 29, 2022 at 10:30 am, or as soon thereafter as the matter may be heard, Defendant Carlos E. Kepke (“Mr. Kepke”) will and does hereby move to exclude the opinions and testimony of the United States’ summary-expert, Revenue Agent James Oertel (“Agent Oertel”), on the grounds that portions of Agent Oertel’s opinion and testimony are irrelevant and unreliable under Federal Rule of Evidence 702 and *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993).

This motion is supported by the Memorandum of Points and Authorities included herein, all pleadings and papers which are of record and on file in this case, and such other oral and documentary evidence as may be presented at the hearing of this motion.

**MEMORANDUM OF POINTS AND AUTHORITIES**

**I. INTRODUCTION**

On June 3, 2022, the government served and filed a “Notice of Intent to Offer Summary Expert Testimony And Summaries of Voluminous Evidence” of Agent Oertel (“Notice”). *See* ECF No. 46. The government also provided Mr. Kepke’s counsel with additional documents including a draft spreadsheet that presumably summarizes these documents.

Agent Oertel is represented to be an accounting and taxation expert holding a Bachelor of Science degree in Business Administration with an emphasis in Accounting from California State University, Hayward, and a Certified Public Accountant license. ECF No. 46, Ex. A. Since 1986, he has worked as an Internal Revenue Agent at the Internal Revenue Service utilizing his accounting degree to examine and audit tax returns to evaluate individuals and entities suspected of tax fraud. *See id.* at 2-3 and Ex. A.

Out of the entire six-page Notice, however, only about a paragraph actually discusses what the government anticipates the content of Agent Oertel’s testimony will be, namely, that he “will assist the jury in understanding the significance of this voluminous evidence, and the tax consequences of the relevant transactions” and “will summarize financial documents (including bank records), witness testimony, and other documents, including tax returns and other documents filed with the IRS (such as Forms 1040), and will provide an analysis of admitted evidence and

1 explain the resulting tax consequences.” ECF No. 46, at 4. It is therefore difficult to discern exactly  
 2 what the government plans to have this witness testify about, or what sources Agent Oertel would  
 3 be relying on, so this motion is necessarily contingent. However, to the extent the government  
 4 plans to use Agent Oertel as a conduit for hearsay witness testimony, or ask him to offer up legal  
 5 conclusions, such testimony would be improper and should be excluded.<sup>1</sup>

## 6 **II. LEGAL STANDARD**

7 Rule 702 of the Federal Rules of Evidence empowers district court judges to act as  
 8 “gatekeepers” of expert testimony to ensure that it is both relevant and reliable. *Daubert v. Merrill*  
 9 *Dow Pharm., Inc.*, 509 U.S. 579, 597 (1993). The trial judge “may exclude testimony that falls  
 10 short of achieving either end.” *Stilwell v. Smith & Nephew, Inc.*, 482 F.3d 1187, 1192 (9th Cir.  
 11 2007) (internal quotes omitted). A court must first determine whether a witness is “qualified as an  
 12 expert by [his] knowledge, skill, experience, training, or education.” Fed. R. Evid. 702. If the  
 13 expert is deemed qualified, that expert may only testify: (i) if his “scientific, technical, or other  
 14 specialized knowledge will help the trier of fact to understand the evidence or to determine a fact  
 15 in issue;” (ii) “the testimony is based on sufficient facts or data;” (iii) “the testimony is the product  
 16 of reliable principles and methods;” and (iv) “the expert has reliably applied the principles and  
 17 methods to the facts of the case.” *Id.* “Maintaining *Daubert*’s standards is particularly important  
 18 considering the aura of authority experts often exude, which can lead juries to give more weight to  
 19 their testimony.” *Mukhtar v. Cal. State Univ.*, 299 F.3d 1053, 1063-64 (9th Cir. 2002).

20 As the party offering the expert opinions, the government bears the burden of establishing  
 21 their admissibility. *Bldg. Indus. Ass’n of Washington v. Washington State Bldg. Code Council*, 683  
 22 F.3d 1144, 1154. (9th Cir. 2012). And it must establish the Rule 702 requirements by a  
 23 preponderance of the evidence. *Daubert*, 509 U.S. at 601 n.10 (citing *Bourjaily v. United States*,  
 24 483 U.S. 171, 175-76 (1987)).

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26 <sup>1</sup> The defense does not object (at least in theory) if all the government plans to do is ask Agent  
 27 Oertel to summarize voluminous records that have been properly authenticated and admitted, so  
 28 long as any records, summaries, or summary charts the government intends to introduce through  
 him are provided well in advance of trial.

1 **III. ARGUMENT**

2 **A. Agent Oertel May Not Be Used as a Conduit for Inadmissible Hearsay**

3 While Federal Rule of Evidence 1006 permits the government to “use a summary, chart, or  
4 calculation to prove the content of voluminous writings, recordings, or photographs that cannot be  
5 conveniently examined in court,” the rule does not allow the proponent witness to serve as a  
6 conduit for testimonial hearsay. While scant with details, the Notice states that Agent Oertel’s  
7 testimony “will be based on evidence admitted at trial” including “witness testimony” and that he  
8 will “summarize . . . witness testimony.” ECF No. 46 at 4.

9 It is unclear why one witness should be permitted to summarize the testimony of other  
10 witnesses. That would be highly unusual, however, so the defense suspects that is not what the  
11 government means. Instead, the defense believes this might be the government’s way of suggesting  
12 that Agent Oertel will be asked to “summarize” the statements of out-of-court declarants (*e.g.*,  
13 witnesses located outside the subpoena power of the Court). If *that* is what they mean, such  
14 testimony would be clearly improper.

15 The Supreme Court has made clear that the Confrontation Clause bars the “admission of  
16 testimonial statements of a witness who did not appear at trial unless he was unavailable to testify,  
17 and the defendant had had a prior opportunity for cross-examination.” *Crawford v. Washington*,  
18 541 U.S. 36, 53-54 (2004). And a Confrontation Clause problem “arises when the expert is ‘used  
19 as little more than a conduit or transmitter for testimonial hearsay, rather than a true expert whose  
20 considered opinion sheds light on some specialized factual situation.’” *United States v. Garcia*,  
21 No. 18-cr-00466-BLF, 2021 WL 4691310, at \* 11 (N.D. Cal. Oct. 7, 2021) (excluding expert  
22 testimony regarding hierarchy, structure, and membership requirements of a gang as such testimony  
23 “also risks violating the Defendants’ rights under the Confrontation Clause.”).

24 **B. Agent Oertel Should Not be Permitted to Offer Legal Conclusions**

25 The Court should exclude any portions of Agent Oertel’s expert opinions that are legal  
26 conclusions. The Ninth Circuit has made it clear that experts cannot “give an opinion as to [their]  
27 *legal conclusion*, i.e., an opinion on an ultimate issue of law.” *Hangarter v. Provident Life &*  
28 *Accident Ins. Co.*, 373 F.3d 998, 1016 (9th Cir. 2004) (emphasis in original). ““When an expert

1 undertakes to tell the jury what result to reach, this does not aid the jury in making a decision, but  
 2 rather attempts to substitute the expert's judgment for the jury's.'" *Navarro et al. v. Hamilton et*  
 3 *al.*, No. 5:16-CV-1856, 2019 WL 351873, at \*2 (C.D. Cal. Jan. 28, 2019) (citation omitted).

4 For instance, in *United States v. Boulware*, the Ninth Circuit excluded testimony from an  
 5 expert testimony who sought to "testify that the corporate distributions were legally non-taxable,  
 6 either because they were loans, monies placed in trust, or returns of capital." 558 F.3d 971, 975  
 7 (9th Cir. 2009). Similarly, in *Risto v. Screen Actors Guild-Am. Fed. of Television and Radio Artists,*  
 8 *et al.*, the court excluded proffered expert testimony that the relevant agreement "was not an arms-  
 9 length transaction" and that a certain fee assessment appeared to contravene "normative law on tax-  
 10 exempt entities." No. 2:18-cv-07241, 2021 WL 4143242, at \*8 (C.D. Cal. July 19, 2021). There,  
 11 the court held that the expert's analysis improperly invaded "the province of the Court by drawing  
 12 impermissible legal conclusions concerning the proper construction of laws and the appropriate  
 13 application of the law to the facts of this case." *Id.*

14 Again, it is difficult to ascertain what Agent Oertel's intended expert testimony will be from  
 15 the Notice. However, to the extent the government intends for him to offer testimony along the  
 16 lines of what the United States "anticipates that the evidence in this case will establish," including:

- 17 (1) "that [Mr. Kepke] worked with Smith to conceal a portion of Smith's income from the  
 18 IRS, thus evading the tax due on that income,"
- 19 (2) that this "was accomplished using offshore entities which [Mr. Kepke] created and  
 20 managed," and
- 21 (3) that Mr. Kepke "knew [that] Smith actually earned this income, and retained full  
 22 dominion and control over it, [but] [n]evertheless, advised Smith to hide the fact that this  
 23 income existed, as well as Smith's true ownership and control over it, from Smith's income  
 24 tax return preparers," (ECF No. 46, at 3-4)

25 such testimony should be excluded for drawing legal conclusions by applying the law to facts of  
 26 the case. An expert should not be permitted to testify that, based on his training and experience,  
 27 Mr. Kepke intended to assist Mr. Smith to evade income tax and that he is therefore guilty as  
 28 charged—guilt or innocence is for the jury to decide. This type of testimony is merely instructing

1 the jury that the evidence demonstrates Mr. Kepke intended to assist Mr. Smith evade taxes due on  
 2 income—which is exactly what the jurors in this trial are supposed to decide.

3 **C. The Defense Requests That the Government Promptly Produce Federal Rule**  
 4 **of Evidence 1006 Materials**

5 The defense raises to the Court’s attention the portions of the government’s Notice that  
 6 indicates not all the materials Agent Oertel intends to rely on have been produced to the defense,  
 7 and will not be produced until “shortly before the witnesses’ testimony.” *See* ECF No. 46, at 6.  
 8 Federal Rule of Evidence 1006 requires that the proponent who intends to use “a summary, chart,  
 9 or calculation to prove the content of voluminous writings” “make the originals or duplicates  
 10 available for examination or copying” “at a reasonable time and place.” This is because “Rule 1006  
 11 is concerned with the *opposing party’s* opportunity for review.” *United States v. Pacific Gas and*  
 12 *Electric Company*, No. 14-cr-00175-TEH, 2016 WL 3856119, at \*2 (N.D. Cal. July 15, 2016)  
 13 (emphasis in original).

14 Given that the government has been investigating Mr. Smith since 2015 and that the charged  
 15 crimes are related to Mr. Smith’s tax filings for the years 2012-2014—almost 10 years ago—it is  
 16 unclear why the defense cannot be provided with all materials and summary charts now, or at least  
 17 well before trial. *See Pacific Gas and Electric Company*, 2016 WL 3856119, at \*2 (excluding  
 18 summary exhibit for failure to timely disclosure). Thus, the defense requests that the Court direct  
 19 the government to produce such materials promptly, at the latest before October 24, 2022, which  
 20 would provide the defense with the time to review the materials and raise any issues at the pretrial  
 21 conference on October 31, 2022.

22 **IV. CONCLUSION**

23 For the foregoing reasons, Mr. Kepke respectfully requests that the Court exclude Agent  
 24 Oertel’s testimony to the extent it attempts to introduce testimonial hearsay or impermissibly offer  
 25 legal conclusions. Additionally, Mr. Kepke requests that the government’s provide any Rule 1006  
 26 materials on a timely basis—no later than October 24, 2022.

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Respectfully submitted,

Dated: August 5, 2022

By: /s/ Grant P. Fondo  
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Attorney for Defendant  
CARLOS E. KEPKE

**CERTIFICATE OF SERVICE**

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States District Court for the Northern District of California by using the CM/ECF system on **August 5, 2022**. I further certify that all participants in the case are registered CM/ ECF users and that service will be accomplished by the CM/ECF system.

I certify under penalty of perjury that the foregoing is true and correct. Executed on **August 5, 2022** in Los Altos, California.

/s/ Grant P. Fondo

GRANT P. FONDO